

91-992
NO. ①

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In the
Supreme Court of the United States

OCTOBER TERM, 1991

NEWPORT LIMITED, A PARTNERSHIP
IN COMMENDAM

Petitioner

Versus

THE BOARD OF COMMISSIONERS,
ORLEANS LEVEE DISTRICT

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
STATE OF LOUISIANA

Basile J. Uddo
2211 Killdeer St.
New Orleans, Louisiana 70122
(504) 832-7204

Counsel of Record
For Petitioner



QUESTIONS PRESENTED

I.

Does the application of Louisiana Revised Statute 19:14 (1976) to the facts of this case deprive Petitioner of important constitutional rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

II.

Does the opinion of the Louisiana Fourth Circuit Court of Appeal deny Petitioner procedural due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, by expanding the nature of the property interest expropriated from an easement to a fee simple without such being requested by Respondent and without notice to Petitioner that such expansion might occur?

III.

Did the Court, by allowing the Respondent to retreat from its "quick-taking" petition and to convert the proceeding to some ill-defined expropriation proceeding without notice to Petitioner, deny due process to Petitioner?

IV.

Did the Court below err in ignoring the evidence in the record that Respondent's 1971 valuation evidence was clearly contradicted by Petitioner?

V

Did the application of Louisiana Revised Statute 19:14 (1976) to the facts of this case unconstitutionally alter the rights of Petitioner and the obligations of Respondent in violation of the prohibition against impairment of contract rights contains in U.S. Const. Art 1, Sec.10?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Grounds for Jurisdiction	1
Constitutional and Statutory Provisions	1
Statement of the Case	4
Reasons for Granting the Writ	5
I. Petitioner has been denied due process and just compensation by the application of La.R.S. 19:14 to this case thereby render- ing said statute unconstitutional "as applied"	5
II. Petitioner was denied due process when the Court below without notice to peti- tioner awarded a fee simple to respondent who had requested only a perpetual easement	17
III. Petitioner was denied due process by the Court's application of a statute not pleaded by respondent that did not afford required constitutional protections	18
IV. The Court below erred in concluding that petitioner had not contradicted respon- dent's 1971 valuation	19

TABLE OF CONTENTS (continued)

	Page
V The application of LA. R.S. 19:14 un- constitutionally impairs the obligations of the contract between the parties	20
Conclusion	21
Certificate of Service	25
APPENDIX:	
Appendix A - Opinion, Louisiana Fourth Circuit, April 16, 1991	A-1
Appendix B-1 - Opinion, Louisiana Fourth Circuit, December 15, 1987	A-10
Appendix B-2 - Judgment and Commissioner's Adopted Recommendation and Findings of Fact, May 25, 1990	A-22
Appendix B-3 - Judgment and Commissioner's Adopted Recommendation and Findings of Fact, November 20, 1986	A-30
Appendix C - Denial of Rehearing, Louisiana Fourth Circuit, May 9, 1991	A-37
Appendix D - Denial of Writ of Certiorari, Louisiana Supreme Court, September 6, 1991	A-38
Appendix E-1 - 1971 Agreement to Expropriate Between Orleans Levee Board and Seaway Land Co., Inc. ancestor in title to Petitioner, May 21, 1971	A-39
Appendix E-2 - Petition for Expropriation Pursuant to LSA-R.S. 38:301, December 23, 1985	A-41

TABLE OF AUTHORITIES

CASES	Page
<i>Albrecht v. United States</i> , 329 U.S. 599 (1947)	10
<i>Allied Structural Steel Co. v. Stannaus</i> , 438 U.S. 234 (1978)	21
<i>Cancienne v. La Fource Parish Police Jury</i> , 423 So.2d 662 (La.app. 1st Cir. 1982)	7,8
<i>Cherokee Nation v. Southern Kansas Ry. Co.</i> , 10 U.S. 970 (1890)	13,14
<i>Danforth v. United States</i> , 308 U.S. 271 (1939)	9,13,14
<i>Kirby Forest Industries v. United States</i> , 467 U.S. 1 (1984)	13,16,17,20
<i>Lake, Inc. v. Louisiana Power and Light</i> , 330 So.2d 914 (La. 1976)	7
<i>Muscany v. United States</i> , 324 U.S. 49 (1945)	11
<i>Olson v. United States</i> , 292 U.S. 246 (1934)	16
<i>Phelps v. United States</i> , 274 U.S. 341 (1927)	20
<i>St. Julien v. Morgan Louisiana and Texas Railroad Co.</i> , 35 La. Ann. (1883)	6,7,8,11
<i>Seaboard Air Line R.R. v. United States</i> , 261 U.S. 299 (1923)	20
<i>United States v. Fuller</i> , 409 U.S. 488 (1973)	15
<i>United States v. 564.54 Acres of Land</i> , 441 U.S. 506 (1979)	16

TABLE OF AUTHORITIES (continued)

CASES	Page
<i>United States Trust Company</i> , 431 U.S. 1 (1977)	21
<i>Walker v. City of Hutchinson, Kansas</i> , 352 U.S. 112 (1956)	18,19
STATUTES	
La.R.S. 19:14	i,1-2,5,6,7,9,17,18,19,20,21,22,24
La.R.S. 38:355	2,14
La.R.S. 38:387	2-3,14,18
TREATISES	
J. Nowak, R. Rotunda and J. Young, <i>Constitutional Law</i> (3rd Ed. 1986)	15



Opinions Below

The 1987 decision of the Louisiana Fourth Circuit Court of Appeal is cited as *Bd. of Levee Comm. v. Newport Ltd.* 517 So.2d 406 (La. App. 4th Cir. 1987) writ denied, 521 So.2d 1152 (La. 1988). The 1991 decision of the Louisiana Fourth Circuit Court of Appeal is cited as *Bd. of Levee Comm. v. Newport Ltd.*, 578 So.2d 191 (La. App. 4th Cir. 1991).

Grounds For Jurisdiction

The 1991 opinion of the Louisiana Fourth Circuit Court of Appeal was issued on April 16, 1991. Application for rehearing was denied on May 9, 1991. Petitioner timely applied for a writ of certiorari to the Louisiana Supreme Court, said application was denied on September 6, 1991.

Therefore, this Court has jurisdiction under 28 U.S.C. § 1257(a).

Statutes and Constitutional Provisions

In any case where the State or its political corporation or subdivision has actually, in good faith believing it had authority to do so, taken possession of privately owned immovable property of another, and constructed facilities upon, under or over such property, such owner shall be deemed to have waived his right to contest the necessity for the taking and to receive just compensation prior to the taking, but he shall be entitled to bring an action for such compensation, to be determined in accordance with the provisions of Section 9 of this Title, for the taking of his property or interest therein, the just compensation to be determined as of the time of the taking of the property, or right or interest therein, and such action shall proceed as if the state, its political corporation or subdivision had filed a

petition for expropriation as provided for in Section 2.1 of this Title.

LA.R.S. 19:14 (1976)

Upon the deposit of the amount of the estimate in the registry of the court, for the use and benefit of the persons entitled thereto, the clerk shall issue a receipt showing the amount deposited, the date it was deposited, the style and number of the cause, and the description of the property and property right as contained in the petition. Upon such deposit, title to the property and the property rights specified in the petition shall vest in the levee district, and the right to just and adequate compensation therefor shall vest in the persons entitled thereto.

LA.R.S. 38:355 (1985)

A. The measure of compensation for the property expropriated is determined as of the time the estimated compensation was deposited into the registry of the court without considering any change in value caused by the proposed improvement for which the property is expropriated.

B. The measure of damages, if any, to the defendant's remaining property is determined on a basis of immediately before and immediately after the expropriation taking into consideration the effects of the completion of this project in the manner proposed or planned.

C. The owner shall be compensated to the full extent of his loss.

D. The levee district or levee and drainage district shall present its evidence of value first.

E. Reasonable attorney's fees may be awarded by the court if the amount of the compensation deposited in the registry of the court is less than the amount of compensa-

tion awarded in the judgment. Such attorney's fees in no event shall exceed twenty-five percent of the difference between the award and the amount deposited in the registry of the court.

LA.R.S. 38:387 (1985)

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Article I, Section X, U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment V, U.S. Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment XIV, Section 1, U.S. Constitution

Statement of the Case

This is a "taking" case, the facts of which turn on a contract between a State agency and a private landowner. In 1971, the State agency induced the landowner to grant a limited permit for immediate commencement of construction on one feature of a proposed flood protection project that would cross its property by expressly undertaking to formally expropriate the requisite permanent property rights at a later date, and stipulating that the value of the property rights would be determined at that later date as though the permitted construction had not taken place. In 1974, further work on the flood protection system affecting that landowner's property was suspended for what proved to be a period of twelve years. In 1985, in anticipation of the resumption of work, the State agency effected the *ex parte*, summary expropriation of the servitude it sought under Louisiana's quick-taking statute (La.R.S. 38:351 et seq). Petitioner answered the petition, contesting only the gross inadequacy of the State agency's estimate of just compensation. Nine months after it had summarily expropriated the servitude, the State agency sought to be relieved of its obligations to compensate the landowner at all under the 1971 Agreement and under the quick-taking statute for that servitude on the grounds that the construction that had been permitted in 1971 had *constituted* a *taking* under Louisiana's *St. Julien* statute (La.R.S. 19:14), and that any right to compensation for that prior hypothetical taking had prescribed.

In the judgment complained of, the Louisiana courts applied the *St. Julien* statute so as to declare the *prior* "taking" of the servitude expropriated by the State agency in 1985, retroactive to the date of the 1971 Agreement and without compensation to the landowner. The Court then declared, *sua sponte*, that the 1985 quick-taking must have

effected the taking of an additional, incremental *fee title* interest in the same property and applied the *St. Julien* statute, rather than the quick-taking statute, in valuing *that* interest, so as to arrive at a valuation date 14 years prior to the quick-taking expropriation. The difference in the 1971 and 1985 valuation dates is in excess of \$2,000,000. The Court ignored the express agreement of the parties that the construction permitted in 1971 would be disregarded in determining compensation, and disallowed the severance damages judicially admitted by the State agency in its petition.

Petitioner raised the question of just compensation from the inception of the "quick-taking" proceedings, in its answer to that action. Moreover, Petitioner raised the constitutional issues discussed below, and others, by Brief to the Fourt Circuit, and by Writ Application to the Louisiana Supreme Court. Neither Court considered the constitutional issues.

Reasons For Granting The Writ

MAY IT PLEASE THE COURT:

I.

Petitioner has been Denied Due Process and Just Compensation by the Application of La.R.S. 19:14 to This Case, Thereby Rendering Said Statute Unconstitutional "As Applied."

The method of taking of Petitioner's property rights countenanced by the Louisiana Fourth Circuit Court of Appeal below is one that has long been recognized as having significant constitutional infirmities that have never been addressed by any court, and which the Louisiana Supreme Court refused to consider here.

On its face, La.R.S. 19:14 seems simple enough. It provides, in essence, a basis for a governmental "taking" of private property by consent or acquiescence of the owner:

In any case where the state or its political corporation or subdivision has actually, in good faith believing it has authority to do so taken possession of privately owned immovable property of another, and constructed facilities upon, under or over such property with the consent or acquiescence of the owner of the property, *such owner shall be deemed to have waived his right...to receive just compensation prior to the taking...*

La.R.S. 19:14 (emphasis added).

It also attempts to specify the basis upon which compensation for such "taking" shall be made:

...he shall be entitled to bring an action for such compensation,..., for the taking of his property or interest therein, *the just compensation to be determined as of the time of the taking of the property, or right or interest therein, and such action shall proceed as if the state, its political corporation or subdivision had filed a petition for expropriation...*

La. R.S. 19:14 (emphasis added).

The underscored provisions make it quite clear that the statute is intended to protect the right of just compensation as though an ordinary expropriation had been filed. Therefore, the significance of the statute is that constitutional rights are deemed waived by consent or silence, and that the precise time of the taking and the determination of compensation must be decided separately.

A.

There Was No Prior
Taking Of The Servitude

La. R.S. 19:14 is a legislative embodiment of a judicial doctrine known as the *St. Julien*¹ doctrine. The statute was enacted in response to a Louisiana Supreme Court decision that overruled *St. Julien*. That decision is significant, because in addition to the nonconstitutional grounds for overturning, the court acknowledged the constitutional infirmities:

Plaintiff strongly urges in brief that the application of the "St. Julien" doctrine *violates constitutional prohibitions against taking property without due process (U.S. Const. Amendments 5 and 14) and against taking private property for public use without compensation. [State citations omitted]. The argument is persuasive, but we decline to rest our opinion on constitutional grounds when there are other reasons which lead to the same result.*

Lake, Inc. v. Louisiana Power and Light Co., 330 So. 2d 914, 917 (La. 1976) (emphasis added).

Despite these constitutional concerns, so clearly expressed, the state legislature effectively overruled *Lake, Inc.* and reinstated *St. Julien* by adoption of La. R.S. 19:14.

That statute's constitutionality has never been assessed by the Louisiana Supreme Court. Although one state appellate court opinion purports to do so, its analysis is premised exclusively upon state constitutional provisions. Nonetheless, it is clear in *Cancienne v. La Fource*

¹ *St. Julien* refers to an ancient Louisiana case reported as *St. Julien v. Morgan Louisiana and Texas Railroad Co.*, 35 La. Ann. 924 (1883).

Parish Police Jury, 423 So. 2d 662 (La. App. 1st Cir. 1982) that the construction of the statute therein involved does not comport with its application in this case, thereby leaving the constitutional question raised herein completely unaddressed.

Several points made in *Cancienne* are relevant to this application. First, the court evaluated the statute only as one that creates a servitude or easement and not one used to take fee title; second, the court rested heavily upon the public policy justification for *not* requiring *removal* of structures built with the consent or acquiescence of the owner:

To avoid the needless waste and public inconvenience in removing expensive works, the court [in *St. Julien*] established the fiction that the owner had granted voluntarily what an expropriation suit otherwise would have compelled him to yield.

Id. at 666 (emphasis added).

The combined presence of consent of the landowner, public interest and the public having built expensive works on private property is the very foundation of *St. Julien* and La. R.S. 19:14.

Id. at 670.

Nothing in *Cancienne* suggests that the concern with protecting completed structures extends to upsetting reasonable bilateral agreements formally to expropriate, or to upsetting normal standards for compensation when formal expropriation proceedings *have* been instituted.

Indeed, the entire basis for the court's constitutional analysis in *Cancienne* is that the "consent" or "acquiescence" of the landowner can constitute a *waiver* of constitutional rights. Significantly, however, *Cancienne*

does not discuss, nor does it have any application to, a situation where whatever consent or acquiescence that occurred was contained in a written, bilateral contract, expressing exactly the nature of that consent or acquiescence. This key factor was ignored by the court here, which applied La.R.S. 19:14. Consequently, the landowner here has been presumed to have waived rights that it *explicitly reserved*.

The 1971 Agreement to Expropriate (Appendix "E-1") expressly grants a "right of entry" to the Levee Board, but clearly specifies that acquisition of permanent property rights would *follow* the determination and payment of just compensation by further "negotiations" or, "if mutually satisfactory terms cannot be agreed upon, that the Board of Levee Commissioners of the Orleans Levee District will take steps to acquire the interest *by condemnation procedure*." (Emphasis added).

It is simply beyond argument that the landowner, under the terms of this agreement acquiesced in anything other than negotiations and, in lieu thereof, normal expropriation procedures for the acquisition of permanent property rights. By applying La. R.S. 19:14 to this case, thereby ignoring, or invalidating *sub silentio*, the contract, the court below deprived Petitioner of all those protections that this Court has applied to such actions.

Moreover, this Court has consistently upheld the enforceability of expropriation contracts as a means of determining issues otherwise left to the ordinary proceedings. *Danforth v. United States*, 308 U.S. 271 (1939) involved expropriation agreements concerning the acquisition of lands in a flood control project. The *Danforth* agreement, among other things, fixed the amount of compensation and agreed to "friendly condemnation proceedings." Subsequent to the confection of the agreement, the government attempt-

ted to withdraw because "the prices first suggested could not be properly recommended to the court." *Id.* at 280. Despite the applicability of a specific statutory scheme to the case, this Court concluded that the parties could con-
fect an agreement that varied what might be awarded under that scheme:

[W]e construe the accepted offer as an agreement to fix the price at the named figure for the ease-
ment sought. Paragraph 3 of the letter shows con-
demnation in mind.

Id. at 282.

Therefore, the agreement of the parties prevailed over a likely different valuation under the statutory provision.

Albrecht v. United States, 329 U.S. 599 (1947) in-
volved an expropriation agreement even more clearly
analogous to the instant case. The agreement stipulated a
purchase price "to be paid at an indefinite future time"
depending on certain conditions, such as conveyance of
good title, or in lieu thereof, condemnation proceedings. *Id.*
at 600. The agreement also granted the government the
right to *immediate possession*. Subsequently, an attempt
to retreat from the consensual valuation divided the par-
ties. In upholding the contract this Court held:

The Fifth Amendment does not prohibit land-
owners and the Government from agreeing be-
tween themselves as to what is just compensation
for property taken...Nor does it bar them from
embodying that agreement in a contract, as was
done here. And, certainly where a party to such a
contract stands upon its terms to enforce them
for his own advantage, he cannot at the same time
successfully disavow those terms so far as he con-
ceives them to be to his disadvantage.

Id. at 603.

See also Muscany v. United States, 324 U.S. 49 (1945) (contracts enforceable).

This is precisely what the court below has allowed the Levee Board to do. The Respondent's agreement in 1971 formally to expropriate permanent property rights at a later date was the inducement for, and was given in exchange for, the landowner's permit to immediately commence construction under the terms of a limited right-of-entry. (Appendix "E-1"). Respondent *did in fact* summarily expropriate the servitude it sought in 1985 using Louisiana's quick-taking statute. The *St. Julien* statute was then applied to relieve Respondent of any obligation to compensate the landowner for the taking of that servitude. The effect of the application of the *St. Julien* statute to the facts of this case is therefore a holding that the landowner's limited permission to construct constituted a waiver of his constitutional right to formal expropriation proceedings and prior compensation despite the fact that the express consideration for that permit was the reservation of those rights, including the Levee Board's express commitment formally to expropriate. Such a result clearly violates the constitutional requirements of due process and just compensation, as well as every concept of logic and fair dealing.

Given that such contracts are clearly enforceable, and given that the instant contract clearly specified that if negotiations failed condemnation proceedings were the agreed-upon method for acquiring permanent property rights and determining just compensation, it violated Petitioner's right to due process for the court below to find a prior taking and to apply anything other than the provisions of the expropriation statute actually invoked by the Respondent to acquire the interest it had agreed to acquire.

Valuation Of
The Expropriated Interest

Although the Court found a prior taking of the servitude here expropriated, and awarded no compensation therefor, it declared, *sua sponte*, that the 1985 quick-taking had expropriated an additional, incremental fee simple interest in the property affected by that servitude. (See Section II below). The Fourth Circuit then ruled that the *St. Julien* statute, and not the quick-taking statute, controlled valuation of this new real property interest because there had been construction prior to the *ex parte* Order of Expropriation.

Newport is entitled to receive the value of the property as of May 21, 1971, the date on which Seaway granted the Board a "Right of Entry" to construct a closure dam and flood gates.

1991 Fourth Circuit Opinion,
Appendix "A" at A-7.

This is clearly erroneous. The 1971 Agreement to Expropriate had clearly contemplated that the agreed-upon acquisition or expropriation would take place subsequent to the permitted construction and the parties had therefore agreed that valuation of the property rights "to be acquired" would be performed as though no construction had taken place. Had the contract been mutually enforced, Petitioner's constitutional rights would have been protected by the consistent application of the judicial expropriation procedure set forth in Louisiana's quick-taking statute. The Louisiana courts made the same error condemned by this Court in *Albrecht, supra*, by enforcing the right-of-entry portion of the contract while completely ignoring the valuation provision.

This Court had consistently held that the provisions of the Fifth and Fourteenth Amendments require that private property not be taken by a governmental unit unless the property owner be paid just compensation *as of the time of the taking*. *Kirby Forest Industries v. United States*, *infra*; *Danforth v. United States*, *infra*; *Cherokee Nation v. Southern Kansas Ry. Co.*, *infra*. This necessarily requires an examination, not performed by *any* court below, of when the taking occurred and what would constitute just compensation.

1.

Time of Taking

This Court's opinion in *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984) is a recent "classic" on the question of "taking" in expropriation litigation. *Kirby* examined the constitutionality of the valuation method used in what was called the "straight - condemnation" procedure, which is the ordinary method of expropriation, and that which the 1971 Agreement to Expropriate clearly contemplated.

Kirby was similar to the instant case in that it involved failed negotiations, begun sometime in 1978, for land for a national park, which led to expropriation proceedings and a deposit of funds by the government in 1982. This Court noted that in order to determine just compensation "the time a taking of a tract of land occurs is crucial to determination of the amount of compensation to which the owner is constitutionally entitled." *Id.* at 11. This Court concluded, citing *Danforth*, *supra*, that "the taking in a condemnation suit under this statute takes place *upon the payment of the money award by the condemnor*." *Id.* (Emphasis added).

The fact that the Levee Board had and exercised a right of entry is irrelevant to determining the taking/valuation date. *See, e.g., Cherokee Nation v. Southern Kansas Ry. Co.*, 10 U.S. 970 (1890):

Within the meaning of the Constitution, the property, although entered upon pending the appeal, is *not taken* until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner.

Id. at 659-60
(emphasis added).

See also Danforth v. United States, supra, (Taking occurs upon payment of compensation).

These clear precedents of this Court, and the unambiguous language of the 1971 Agreement to Expropriate, make it impossible to conclude on this record, in light of the constitutional standards applicable, that the "taking" here occurred in 1971 or that compensation for a 1985 taking should be valued as of a 1971 date.

The Levee Board, in order to effect the summary seizure of the servitude it needed to permit the resumption of construction, elected to utilize Louisiana's quick-taking Statute, judicially admitting that it did not own the servitude it sought. That statute *stipulates* that the date the Levee Board deposits its estimate of just compensation in the registry of the court, December 23, 1985, is 1) the date the property rights vest in the Levee Board, (the "taking")(La.R.S. 38:355), 2) the date the right to just and adequate compensation vests in the landowner (La.R.S. 38:355), and 3) the date of valuation of the property rights "taken." (La.R.S. 38:387(A)).

Just Compensation

The difference in evaluation dates is truly significant. Indeed, the record below indicates more than a \$2,000,000 difference between the 1971 evaluation and the date of the expropriation proceedings. Moreover, the Court below completely rejected any assessment for severance damages. Both of these results constitute a clear violation of the "just compensation" standard imposed by this Court. Given that the date of the taking must be either the date of the filing of the petition (see section III below) or the date of payment of compensation, the court below should have determined the market value of the property as of December 23, 1985, the date of filing of the petition, deposit of estimated value, and vesting of the property rights and right to compensation.

Though market value may at times be elusive, "the overall standard is governed by basic equitable principles of fairness." See J. Nowak, R. Rotunda and J. Young, *Constitutional Law* 417 (3rd Ed. 1986) citing *United States v. Fuller*, 409 U.S. 488 (1983).

That principle of fairness requires adherence to a Fifth Amendment minimum:

In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property "in as good a position pecuniarily as if the property had not been taken".... The Court therefore has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled to receive

“what a willing buyer would pay in cash to a willing seller at the time of taking.”

United States v. 564.54 Acres of Land, 441 U.S. 506, 510-11 (1979) (citations omitted).

Accord: Olson v. United States, 292 U.S. 246 (1934).

It is this value that the landowner had agreed to when it entered the 1971 Agreement to Expropriate, *i.e.*, a valuation based upon negotiations, or if that failed, a valuation determined in some expropriation proceeding in the future, which proceeding Respondent was obligated to institute. It is also this value that was effectively ignored by the Court below when it applied a 1971 market value to a 1985 taking by formal expropriation. The dilatory condemnor, not the helpless landowner, should pay the price of the delay.

Kirby, supra, was concerned with the constitutional significance of this very issue: dramatic changes in value between valuation date and payment. As this Court framed the issue:

However reasonable it may be to designate the date of trial as the date of valuation, *if the result of that approach is to provide the owner substantially less than the fair market value of his property on the date the United States tenders payments, it violates the Fifth Amendment.*

467 U.S. at 17
(emphasis added).

This Court went on to conclude that some procedure must always be available to modify “a condemnation award when there is a substantial delay between the valuation and the date the judgment is paid during which time the

value of the land changes materially." 467 U.S. at 18. *Kirby* was concerned with a three year delay between valuation and payment, how much more violative of the Fifth Amendment is a 15 year delay?

Clearly, the application of La. R.S. 19:14 to this case is wholly inappropriate because it denies Petitioner anything approaching just compensation. Moreover, Petitioner has no further procedural protection beyond this Court as *Kirby* holds must exist. To deny review of this case is to give the Levee Board a two million dollar plus windfall, while forcibly extracting the same from Petitioner. Every precedent of this Court rebels at such a notion.

II.

Petitioner Was Denied Due Process When The Court Below Without Notice to Petitioner Awarded Fee Simple Title to Respondent Who Had Only Requested a Perpetual Easement.

The Levee Board filed only one expropriation petition (Appendix "E-2"). That pleading refers to the expropriation of "rights of way" reflecting the Board resolution (Exhibit C to the petition), which also refers only to "rights of way." Additionally, the attached market appraisal (Exhibit E to the petition), which served as the basis for the 1971 valuation deposit as its estimate of just compensation, clearly indicates that it was evaluating "Perpetual Easements for Bayou Bienvenue Control Structure." No evidence was ever proffered on the value of a fee interest in the property.

Therefore, Petitioner reasonably believed and responded to the valuation and expropriation of *easements*,

not fee simple, which incremental fee interest included, among other things, mineral rights. Nonetheless, without notice to the parties, the Fourth Circuit 1991 Opinion (Appendix "A") inexplicably ruled that the Petition vested "fee simple title to the 25.77 acres in the Board..." At 4.

Therefore, despite the clear wording of the petition, resolution and appraisal, the Court awarded significantly more than was being expropriated. Not only does this further exacerbate the denial of just compensation, but it deprives Petitioner of due process for lack of notice. *See Walker v. City of Hutchinson, Kansas*, 352 U.S. 112 (1956).

III.

Petitioner Was Denied Due Process By The Court's Application Of A Statute, Not Plead-
ed By Respondent, That Did Not Afford Re-
quired Constitutional Protections.

As noted above, the only expropriation pleading filed by the Levee Board was its quick-talking petition that was based upon La.R.S. 38:351. Under that statute, the valuation date is clearly fixed as "the time the estimated compensation was deposited into the registry of the court...." La.R.S. 38:387. That date was December 23, 1985.

Moreover, it was this statute, and this statute alone, that supported the trial court's *ex parte* order of expropriation. No such order could be tolerated unless there was a requirement of a good faith valuation and deposit of funds to protect the dispossessed landowner.

Nonetheless, the Fourth Circuit, without notice to Petitioner, and without citation of authority, and by a mere *ipse dixit*, decided to substitute La.R.S. 19:14 for the quick-taking statute. That left Petitioner with an untenable situation:

1) No opportunity to defend against this capricious shift; 2) loss of title to property in 1985; and 3) no concomitant statutory protection of a 1985 valuation. In short, the Fourth Circuit allowed the extraordinary quick-taking on the one hand, while relegating compensation to the vagaries of La.R.S. 19:14, on the other.

As a consequence, Petitioner has been denied due process because the petition that initiated the expropriation, and that was served on Petitioner, was based upon a statutory procedure designed to exchange expediency for immediate deposit of "just compensation", based upon 1985, not 1971, values. By shifting to a different statute, without warning, and contrary to its 1987 opinion, the Fourth Circuit protected Respondent's expediency, but denied Petitioner's just compensation.

Had Petitioner been given even minimal notice of this impending switch, either by Respondent or the court, it could have defended against the absurdity of such a procedural farce. See, *Walker v. Hutchinson, Kansas*, 352 U.S. 112 (1956).

IV.

The Court Below Erred In Concluding That
Petitioner Had Not Contradicted the
Respondent's 1971 Valuation.

Without conceding the applicability of the 1971 valuation date, it should be noted that even if that were the appropriate point of valuation the Fourth Circuit was clearly wrong to conclude that Petitioner did not contradict the valuation offered by Respondent. The record below is replete with evidence that even if one used the 1971 date the expropriated portion should have been valued at \$384,600.00, with severance damages of \$256,360.00 for a

total of \$640,960.00. Respondent's value and payment of \$146,564.00 was clearly refuted at the trial.

Moreover, even if the Respondent's valuation were correct, Petitioner would be entitled to interest from 1971, or some other corrective procedure to adjust for the increase in value through 1985.

As this Court said in *Kirby, supra*, "if the disbursement of the award is delayed the owner is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with appropriation". 467 U.S. at 10. See also, *Phelps v. United States*, 274 U.S. 341, 344 (1927); *Seaboard Air Line R.R. v. United States*, 261 U.S. 299,306 (1923).

Kirby, as noted previously, also holds that the Fifth Amendment requires some procedure that would modify "a condemnation award when there is a substantial delay between the valuation and the date the judgment is paid" when the land changes materially in value during the delay. Therefore, even if the 1971 valuation date is correct, the Fifth Amendment requires a modification of that amount to reflect the 1985 payment date.

V.

The Application Of La.R.S. 19:14 Unconstitutionally Impaired The Obligations Of The Contract Between The Parties

The decision of the Louisiana Courts is expressly premised on the application of La.R.S. 19:14, Louisiana's *St. Julien* statute, to the facts of this case so as to find a prior taking of the servitude here expropriated and so as to

value the additional fee interest declared to have been expropriated in 1985 at a 1971 date. La.R.S. 19:14 was not enacted until 1976, five years after the date of the 1971 Agreement to Expropriate and two years after the 1974 cessation of the construction activities permitted thereunder.

As the record shows the 1971 Agreement to Expropriate was a bilateral, enforceable agreement that constituted the law between the parties. The agreement reserved permanent property rights for later acquisition and stipulated 1) the agreed-upon methods of acquisition, 2) that the Levee Board and not the landowner was obligated to institute formal expropriation proceedings, and 3) that the effects of the permitted construction were to be disregarded in the subsequent valuation of the property rights.

The application of La.R.S. 19:14 altered the rights of the Petitioner and the obligations of the Respondent under the terms of that agreement so as to divest Petitioner of its property and contract rights in violation of the constitutional prohibition against laws impairing the obligations of contract. U.S. Const. Art. 1, Sec. 10.

In *United States Trust Company*, 431 U.S. 1, (1977), this Court set forth the analysis applicable in cases involving alleged contract clause violations when a State is a party to the contract. The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Stannus*, 438 U.S. 234, at 244 (1978). See *United States Trust Company, supra*, at 17. If the State regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, *United States Trust Company, supra*, at 22. The effect of the Fourth Circuit's application

of La.R.S. 19:14 here has been to destroy Petitioner's property rights and has resulted in a valuation of the property as of the date 14 years prior to the date on which the Respondent actually acquired permanent property rights, thus improperly denying to the landowner increases of the value of the land due to the passage of time and the industry of the owner/developer.

No legitimate public purpose is served by relieving the Levee Board of the contractual obligation that it voluntarily undertook in order to induce the landowner to permit the immediate entry and commencement of construction sought by the Levee Board. The Levee Board is a State agency with the power to contract, to sue and to be sued in its own name, and the power to expropriate. The Levee Board here proposed the terms of the 1971 Agreement to Expropriate, the terms are not unreasonable, and the retroactive repudiation of the Levee Board's obligations under those terms effected by the adoption, in 1976, of La.R.S. 19:14 constitutes an unconstitutional impairment of the obligations of that contract. U.S. Const. Art. 1, Sec. 10.)

Conclusion

Petitioner had recognized, and had agreed to, the expropriation by the Levee Board of easements over its property, at a fair price. The Levee Board resisted paying any price from 1971 to 1985 and in 1985 refused to pay the price provided by the very statute under which it had exercised its right to expropriate.

The Louisiana court has applied the *St. Julien* statute, which was enacted in 1976, to a bilateral agreement to expropriate entered into by a private landowner and a state agency in 1971, so as to deny Petitioner of its property and contract rights in violation of the Constitutional prohibition against laws impairing the obligations of contract contained in Article 1, Section 10 of the U.S. Constitution.

The Louisiana Court has not only given the Levee Board a greater right than sought, but has used a valuation date that is contrary to the U.S. Constitution and to the statute under which the Levee Board has expropriated these property rights.

The Court then valued that fee simple interest without any evidence or expert testimony. The variety of factual situations in the increasingly complex, and serious, conflict between public necessity and private property, has brought hundreds of cases before this Court. Patterns are elusive and this Court has recognized the *ad hoc* nature of many of its decisions. Therefore, it is submitted that Writ review is required here under the Fifth and Fourteenth Amendment, even if broader significance than the present incongruity and injustice cannot be articulated.

However, this expropriation case could have significance beyond the egregious unfairness and constitutional deprivations suffered by Petitioner. Many States have statutes similar to those involved in this case. Louisiana's errant interpretation of these statutes may well influence other public bodies to emulate the expediency with which the Levee Board effected a \$2,000,000 windfall against all logic, and against the statute itself. What State or Federal agency would not be tempted to "tie up" valuable property with consensual agreements to expropriate that allow them 15 years of free use with no greater risk than a retrospective evaluation? Even those States with no counterpart of La.R.S.19:14 would be hard pressed not to enact such a statute that allows a government a real estate bonanza - 1985 property at 1971 prices!

This Court certainly cannot tolerate, much less encourage by its silence, such abuse of authority. Private property is the backbone of our system, expropriation is a recognized, but regrettable, necessity. The Fifth Amendment exists to control, or make evenhanded and fair, the exercise by government, State or Federal, of that power. If this case stands, the two will be reversed and property ownership will be treated as a privilege, helpless in the face of unrestrained State action. Petitioner seeks the intercession of this Court and the application of the protection afforded by that amendment to this abuse of the expropriation process by a State agency and by the Louisiana courts.

Respectfully submitted,

BASILE J. UDDO
2211 Killdeer Street
New Orleans, LA. 70122
(504) 832-7204
Counsel of Record for Petitioner

Certificate of Service

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon Counsel for Respondent this date by depositing three copies hereof in the United States mail, first class postage prepaid.

BASILE J. UDDO

A-1

APPENDIX A

THE BOARD OF LEVEE	*	NO. 90-CA-1490
COMMISSIONERS FOR THE		
PORT OF NEW ORLEANS	*	COURT OF
		APPEAL
versus	*	FOURTH
		CIRCUIT
NEWPORT LIMITED, A	*	STATE OF
PARTNERSHIP IN		LOUISIANA
COMMENDAM		

* * * * *

APPEAL FROM CIVIL DISTRICT COURT,
PARISH OF ORLEANS
DIVISION "J", NO. 85-21837
HONORABLE GEORGE C. CONNOLLY, JR., JUDGE

* * * * *

COURT OF APPEAL
FOURTH CIRCUIT
FILED
APR 16 1991

JUDGE DENIS A. BARRY

Author

* * * * *

(COURT COMPOSED OF JUDGE DENIS A. BARRY,
JUDGE DAVID R. M. WILLIAMS AND JUDGE
RUDOLPH F. BECKER, III)

RICHARD J. MCGINITY, JR., GENERAL COUNSEL
THE BOARD OF COMMISSIONERS OF THE
ORLEANS LEVEE DISTRICT

Suite 100, Administration Building

Lakefront Airport

New Orleans, Louisiana 70126

Attorney for Plaintiff/Appellee

M. ARNAUD PILIE'

PILIE', PILIE' and LANDRY

639 Loyola Avenue

2818 One Poydras Plaza

New Orleans, Louisiana 70113

Attorney for Defendant/Appellant

APR 16 1991

REVERSED

This Court previously considered the lengthy facts underlying this expropriation suit. *Board of Levee Commissioners v. Newport Limited*, 517 So.2d 406 (La. App. 4th Cir. 1987), *writs denied* 521 So.2d 1152 (La. 1988).

In summary, on December 13, 1985 the Orleans Levee Board sued Newport Enterprises and Newport Limited (Newport) pursuant to La. R.S. 38:351, *et seq.* to acquire title to 25.77 acres on which the Board had constructed a channel and flood control structure in 1974. The Board deposited \$113,388 in the Court's registry as the value of the property and \$33,176 for severance damages to an adjoining 15.08 acre tract. Newport withdrew the funds and filed a reconventional demand for additional compensation. The Board moved to dismiss the entire proceeding on the basis that the right to compensation was a personal right of Newport's ancestor in title which Newport did not acquire when it purchased the property. The Board also claimed that it had acquired the property by prescription. The trial court characterized the Board's motion to dismiss as exceptions of no right of action and prescription. After a hearing before a Commissioner the trial court granted the exceptions and dismissed the suit.

This Court agreed that the claim had prescribed under R.S. 19:2.1(B) and *Brooks v. New Orleans Public Service*, 370 So.2d 686 (La. App. 4th Cir. 1979), *writs denied* 373 So.2d 512 (La. 1979), because the Board had occupied the property for over two years. However, the Court, *sua sponte*, held that the evidence overwhelmingly showed that the Board had tacitly, if not expressly, renounced its prescriptive rights, thereby creating a new obligation to compensate the land owned. 517 So.2d at 410.

This Court remanded to determine whether Newport or Seaway Land Company, Inc., Newport's ancestor in

title, was entitled to additional compensation for the expropriated property and for a valuation of the land.

The matter was again referred to a Commissioner for trial. The board amended the original petition to add Seaway and its stockholders as parties and prayed for a declaratory judgment that it was not liable for the 1971 taking; alternatively, that any liability be limited to the \$146,564 deposited in court. The Board argued that renunciation of prescription is a donation prohibited under Article 7, § 14(A) of the 1974 Constitution and that renunciation of prescription by an officer of a political subdivision without specific written authority is *ultra vires* and invalid.

The Commissioner found that Seaway had transferred to Newport whatever compensation rights it owned. Seaway and its stockholders did not appeal.

The Commissioner stated that (contrary to the reasoning of this Court) the State had no "natural obligation" to pay for property after the claim prescribed, and concluded that renunciation of prescription in favor of the land owner by the Board was a prohibited donation under Article 7 § 14(A). The Commissioner recommended that the expropriation proceeding be dismissed. In the alternative, he recommended that if Newport was entitled to compensation it should receive the same price per square foot that it paid for the land in 1984.

The trial court adopted the Commissioner's recommendation and dismissed the main and incidental demands, but did not order Newport to return the money.

LAW OF THE CASE

Newport argues that the trial court erred by refusing

to treat our 1987 opinion (writs denied) as "the law of the case" and by overruling Newport's exceptions to the Board's Supplemental and Amending Petition for Declaratory Judgment.

The "law of the case" is a policy by which an appellate court will not, on a subsequent appeal, re-consider its earlier ruling in the same case. That policy applies against those who were parties to the case when the prior decision was rendered and who had their day in court. Some reasons for applying the policy are: avoiding indefinite re-litigation of the same issue; obtaining consistent results in the same litigation; fairness to both parties; and affording one opportunity for argument and decision of the matter at issue. *Gay v. Campbell-Grosjean Roofing & Sheet Metal Corp.*, 256 So.2d 105 (La. 1971); *Petition of Severage & Water Board of New Orleans*, 278 So.2d 81 (La. 1973). The law of the case policy is discretionary.

THE 1985 EXPROPRIATION

Assuming, *arguendo*, that the Board did not renounce prescription, on December 13, 1985 (date of the expropriation petition) the property was subject to a Levee Board servitude for the flood control structure and the landowner's right to compensation for the servitude had prescribed. La. R.S. 19:14 and 19:2.1(B). Newport was the record owner of the underlying property.

On that date the Board expropriated the property pursuant to a resolution of its Commissioners. The filing of the expropriation petition vested fee simple title to the 15.77 acres in the Board and the right of compensation to Newport. La. R.S. 38:355. That acquisition was a separate taking from the previously acquired servitude. Newport's right to be compensated for its fee simply interest had not

prescribed.

VALUATION

Newport assigns numerous errors as to valuation. Essentially, it claims that the trial court did not follow statutory procedures to determine just compensation.

Newport relies on R.S. 38:387 which provides in pertinent part:

A. The measure of compensation for the property expropriated is determined as of the time the estimated compensation was deposited into the registry of the court without considering any change in value caused by the proposed improvement for which the property is expropriated.

B. The measure of damages, if any, to the defendant's remaining property is determined on a basis of immediately before and immediately after the expropriation taking into consideration the effects of the completion of the project in the manner proposed or planned.

C. The owner shall be compensated to the full extent of his loss.

If Section 387 is applicable, Newport is entitled to receive the value of the property as of December 13, 1985, the date the Levee Board deposited funds into court.

Section 387(A) applies when a levee district expropriates property prior to constructing an improvement on the property. It does not refer to an expropriation after a project is completed.

In this instance, the Levee Board obtained possession of the property in 1971 and completed the flood control structure in 1974, eight years prior to Newport's purchase of the property and eleven years before filing this suit.

The flood control structure is a 25.77 acre channel which severs 15.08 acres from the remainder of Newport's 697.99 acre tract. Newport's purchase price obviously reflected the fact that the channel could not be developed and the 15.08 acre section was accessible only by water.

We find no basis for Newport to claim damages for construction of the channel. *State Dept. of Highways v. Bitterwolf*, 415 So.2d 196 (La. 1982). Nevertheless, Newport must be compensated for the expropriation of its fee simple interest. LSA-Const. Art. 1, § 4 and Art. 6, § 42.

We look to general statutory provisions on expropriation to determine the proper valuation date. R.S. 19:14 provides in pertinent part:

In any case where the state or its political corporation or subdivision has actually, in good faith believing it had authority to do so, taken possession of privately owned immovable property of another, and constructed facilities upon, under or over such property with the consent or acquiescence of the owner of the property, such owner shall be deemed to have waived his right to contest the necessity for the taking and to receive just compensation prior to the taking, but he shall be entitled to bring an action for such compensation, to be determined in accordance with the provisions of Section 9 of this Title, for the taking of his property or interest therein, the just compensation to be determined as of the time

of the taking of the property, or right or interest therein, and such action shall proceed as if the state, its political corporation or subdivision had filed a petition for expropriation as provided for in Section 2.1 of this Title.

Section 14 refers to R.S. 19:9 to determine the compensation for property on which the State or its political corporation or subdivision has constructed facilities with the consent or acquiescence of the owner.

R.S. 19:9 provides in pertinent part:

A. In estimating the value of the property to be expropriated, the basis of assessment shall be the value which the property possessed before the contemplated improvement was proposed, without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work.

B. The owner shall be compensated to the full extent of his loss. . .

Newport is entitled to receive the value of the property as of May 21, 1971, the date on which Seaway granted the Board a "Right of Entry" to construct a closure dam and flood gates. *A.K. Roy, Inc. v. Board of Commissioners for Pontchartrain Levee District*, 117 So.2d 60 (La. 1960). *Chenevert v. La. State Dept. Hwys.*, 345 So.2d 960 (La. App. 4th Cir. 1977); *Reddel v. La. State Dept. Hwys.*, 340 So.2d 1010 (La. App. 4th Cir. 1976). We would reach the same valuation if we proceeded under the assumption that the Levee Board had renounced its prescriptive rights.

The Board had submitted evidence that the -

reasonable value of the property and severance damage sustained in 1971 equals \$146,564, the amount deposited when the expropriation petition was filed. Newport has not contradicted that evidence. Newport has withdrawn those funds.

ATTORNEYS FEES

Newport argues that it is entitled to reasonable attorneys fees under R.S. 38:387(E).

Section 387(E) is inapplicable because the amount deposited in court is the same sum awarded herein.

The judgment of the district court is reversed. Each party is to pay its own costs.

REVERSED

APPENDIX B-1

THE BOARD OF LEVEE
COMMISSIONERS OF THE
ORLEANS LEVEE DISTRICT

NO. CA-7522

COURT OF
APPEAL

VERSUS

FOURTH
CIRCUIT

NEWPORT LIMITED, A
A PARTNERSHIP IN
COMMENDAM

STATE OF
LOUISIANA

* * *

APPEAL FROM THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
NO. 85-21837, DIVISION "J"
HONORABLE GEORGE C. CONNOLLY, JR., JUDGE

* * *

ROBERT L. LOBRANO
JUDGE

(Court composed of Judges Denis A. Barry,
Robert L. Lobrano and Charles R. Ward)

DEC 15 1987

RICHARD J. McGINITY
New Orleans, La. 70113
FOR PLAINTIFF-APPELLEE

JOHN M. WILSON
JULIE E. SCHWARTZ
Liskow & Lewis
New Orleans, La. 70139-5001
FOR DEFENDANT-APPELLANTS

REVERSED AND REMANDED.

This expropriation suit was filed by the Orleans Levee Board against Newport Enterprises and Newport Limited (Newport) seeking a certain 25.77 acre tract for flood wall, floodgates and other flood control structures. The Levee Board deposited the sum of \$146,564.00 in the registry of the Court pursuant to La. R.S. 38:351, et. seg. and immediately acquired the rights to the 25 acre tract. Newport reconvened seeking additional compensation. Nine months later, the Levee Board filed a motion to dismiss its own proceeding asserting that Newport did not acquire its ancestor in title's right to claim compensation; and that, even if it did, those rights have prescribed. When presented with this unusual procedural status, the trial court characterized the motion as exceptions of no right of action and prescription. After a lengthy hearing before a court appointed commissioner, the trial court relying on *St. Julien v. Morgan, Louisiana and Texas Railroad Co.*, 35 La. Ann 924 (1883) and La. R.S. 19:2.1 upheld both "exceptions" and dismissed this action. Newport appeals.

FACTS:

On May 21, 1971, Seaway Land Co. Inc., Newport's ancestor in title, granted the Levee Board a "Right of Entry" to enter upon approximately 25 acres of its land for the purpose of constructing a closure dam and flood gates in the area of Bayou Bienvenue and the Mississippi River Gulf Outlet.

Acting on the "Right of Entry" the U.S. Army Corps of Engineers completed the project in September of 1974. In addition to the authority granted to enter Safeway's property, the agreement also provided:

"It is agreed that negotiations will be entered into promptly for the acquisition by the Board of Levee Commissioners of the Orleans Levee

District of fee simple for the control structure site, permanent easements for the channel and a temporary area for placement of spoils, in the lands upon which this right of entry is granted under mutually satisfactory terms, or, if mutually satisfactory terms cannot be agreed upon, that the Board of Levee Commissioners of the Orleans Levee District will take steps to acquire the interest by condemnation procedure."

On June 12, 1982, Seaway sold its property, including the 25 acre project area, to Newport. Up until that time, no compensation for the taking had been paid to Seaway, nor had any expropriation proceedings been instituted. The cash sale was silent as to the transfer of Seaway's rights to claim compensation. On May 15, 1985 an Act of Correction and Clarification was executed between Seaway and Newport which states that it was the intention of Seaway to transfer all rights in and to the subject property, both real and personnal, to Newport. On December 13, 1985 the Levee Board instituted these proceedings against Newport, which were ultimately dismissed on the Levee Board's own motion.

Newport complains that:

- 1) Procedurally, the trial court erred in allowing the Levee Board to proceed with a motion to dismiss its own expropriation suit filed under R.S. 38:351 et. seq.
- 2) The prescriptive plea under the *St. Julien* doctrine or R.S. 19:14 is not applicable to this case; and alternatively, the Levee Board is estopped from urging prescription.
- 3) The Court was in error in failing to consider proffered evidence which clearly establishes a transfer of Seaway's rights.

- 4) The valuation of its property should be determined as of the date of the expropriation proceedings.

PROCEDURAL POSTURE OF THE CASE

We admit, at first glance, the procedural posture of this case is somewhat confusing. The Levee Board instituted an expropriation suit pursuant to the authority granted in R.S. 38:351, et. seq. It then filed a motion to dismiss its own action claiming (1) the party defendant was improper and (2) any claims for the compensation it judicially admitted was due, was, in fact, not due because of prescription.

The trial court, recognizing this perplexing dilemma, treated the motion to dismiss as exceptions of prescription and no right of action to the reconventional claim of Newport for additional compensation. Presumably, if Newport had not contested the adequacy of the compensation, those "exceptions" would be moot. However, as suggested by Newport, a more proper procedural classification of the motion to dismiss is a request for declaratory judgment. When the Levee Board sought to dismiss its own action on the grounds asserted, it, in effect, sought to have the court declare whether Newport was entitled to compensation for the 25 acres. Although presented in an unorthodox manner, these issues were determined by final judgment. In the interest of judicial economy, we therefore address those issues which were determined by the trial court after a full evidentiary hearing.

PRESCRIPTION

Newport argues that the May 1971 agreement granted the Levee Board only a right of entry to the subject property in order to construct a flood control structure.

That in so doing, the Levee Board acquired no rights in the property but that they (Levee Board) would, at some future time, acquire those rights and compensate the landowner therefor. Thus, they argue, a servitude was not acquired in good faith, nor was there consent of the landowner, and therefor, the *St. Julien* doctrine (R.S. 19:14) is inapplicable.

The case of *St. Julien v. Morgan Louisiana and Texas R.R.Co.*, supra, established the doctrine that a public or quasi-public corporation with powers of expropriation could acquire a servitude over the land of another without legal expropriation if that landowner consented or acquiesced. That doctrine, subsequently referred to as the *St. Julien* doctrine, remained in our law until its short demise in 1976. In *Lake Inc. v. Louisiana Power & Light Co.*, 330 So.2d 914 (La. 1976), the Supreme Court recognizing the conflict *St. Julien* presented with the provisions of our Civil Code governing the creation of servitudes, overruled that doctrine as it applied to discontinuous servitudes. Implicit in that holding is the conclusion that *St. Julien* would apply with respect to continuous servitudes as long as the time limitations of the Civil Code were adhered to. Thus with respect to continuous servitudes, *St. Julien* could be consistent with the Civil Code.

In response to that decision, however, the Louisiana legislature passed Act 504 of 1976. That act, codified at La. R.S. 19:14, provides in pertinent part:

"In any case where the state or its political corporation or subdivision has actually, in good faith believing it had authority to do so, taken possession of privately owned immovable property of another, and constructed facilities upon, under or over such property with the consent or acquiescence of the owner or the property, such owner shall be deemed to have waived his right to

contest the necessity for the taking and to receive just compensation prior to the taking, but he shall be entitled to bring an action for such compensation, to be determined in accordance with the provisions of Section 9 of this Title, for the taking of his property or interest therein, the just compensation to be determined as of the time of the taking of the property, or right or interest therein, and such action shall proceed as if the state, its political corporation or subdivision had filed a petition for expropriation as provided for in Section 2.1 of this Title."

Thus, the legislature's quick response to the *Lake* decision resulted in a statutorily created St. Julien doctrine, but without resolution of the conflicts with the Civil Code noted in that decision. Even though Title III and Title IV of our Civil Code, dealing with personal and predial servitudes were amended and reenacted by Acts 1976, No. 103, and Acts 1977, No. 514, respectively, the conflicts noted in *Lake* still exist. While R.S. 19:14 fails to specify the length of time a public body must possess in order to establish a servitude, Civil Code Article 742 provides that an apparent servitude may be acquired by ten years peaceable possession, in good faith and by just title, or thirty years without title or good faith. The comment to Article 544 suggests that a usufruct (personal servitude) may be acquired by prescription. More probably, the servitude sought by the Levee Board in this case is a right of use that should be regulated by the prescriptive period of Article 742. *La. C.C. Arts. 639 and 645.*

Despite the legislature's failure to reconcile the codal conflicts, R.S. 19:14, as a legislative enactment, has equal status with our codal provisions. *Trustee Corp. v. Allen*, 359 So.2d 715 (La. App. 4th Cir. 1978). And the enactment's failure to provide for a prescriptive period has

necessitated judicial interpretation of intent. This Court in *Brooks v. New Orleans Public Service*, 370 So.3d 686 (La. App. 4th Cir. 1979) writs denied 373 So.2d 512 (La. 1979), held that the two year period set forth in R.S. 19:2.1(B) is applicable. That provision provides:

“All claims for property by, or for damages to the owner caused by the expropriation of property pursuant to R.S. 19:2 shall be barred by the prescription of two years commencing on the date on which the property was actually occupied and used for the purposes of the expropriation.”

This result was also suggested in the later case of *Succession of Rovira v. Board of Commissioners*, 418 So.2d 1382 (La. App. 4th Cir. 1982), writs denied 423 So.2d 1147 (La. 1982), although prescription was not applied because of lack of notice to the owners.

Thus, the trial court, relying on the *Brooks* case and its application of the two year limitation, held that the landowner's rights to compensation had prescribed.

The legislature, by statute created a method of establishing a servitude by a public body or corporation, with expropriation powers, not provided for in our Civil Code provisions on creation of servitudes and requires judicial interpretation to “fill in the gaps”. The *Brooks* case imposed the two (2) year period of R.S. 19:2.1(B) as the appropriate prescriptive period. We question the wisdom of that decision since it has been held that the two year period only applies to claims for compensation after there has been a *legal* expropriation. *A.K. Roy, Inc. v. Board of Commissioners*, 237 La. 541, 111 So.2d 765 (La. 1959); *Mississippi River Transmission Corp. v. Tabor*, 757 F.2d 662 (5th Cir. 1985). We think the better reasoning would have been to apply the rules established by our Civil Code.

However, because of the result we reach in this case, we reluctantly follow the *Brooks* decision and apply the two year prescriptive period.

Once the project was completed, presumably on September 13, 1974 as evidenced by the letter of completion from the Corps of Engineers to the Levee Board, the two year prescriptive period for the landowner to seek compensation began to run. Factually, the evidence substantiates the finding that the landowner consented to the construction of the flood control structures. The May 1971 agreement acknowledges this consent, and certainly the structure was visible to the landowner. And, the Levee Board was in good faith in its belief that it had the authority to enter the property and construct the flood control structure.

However, even though the prescriptive period presumable had accrued on September 13, 1976, we find the evidence overwhelming that the Levee Board tacitly, if not expressly, renounced this prescriptive plea and created a new obligation to compensate the landowner.

Although the effect of the *Brooks* decision is the creation of a servitude once the two year period has accrued, in actuality that period is a liberative prescriptive period. It bars any claims for compensation if not asserted within two years from the date the property was actually occupied.

Liberative prescription is a method of barring actions because of inaction for a period of time. *La C.C. Art. 3447*. A civil obligation of the debtor. *La. C.C. Art. 1762*; *Succession of Aurianne*, 219 La. 701, 53 So.2d 901 (La. 1951). The natural obligation may be sufficient cause for a new promise, and thus a contract for its performance is onerous. *La. C.C. Art. 1761*; *Succession of Aurianne*, *supra*.

Once prescription has accrued, it may be renounced. *La. C.C. Art. 3449* Renunciation may be tacit or express. *La. C.C. Art. 3450*. "Tacit renunciation results from circumstances that give rise to a presumption that the advantages of prescription have been abandoned." *Id.* It has been held that a renunciation takes place only when the intent to renounce is clear from either the words or actions or the party in whose favor prescription had accrued. *Corsey v. State Dept. of Corrections*, 366 So.2d 964 (La. App. 1st Cir. 1978), reversed on other grounds, 375 So.2d 1319 (La. 1979). The promise to pay a debt after prescription accrues creates a new obligation on the debtor. *Service Parts Company v. Culpepper*, 143 So.2d 498 (La. App. 2nd Cir. 1962), citing *Succession of Kugler*, 23 La. Ann. 455.

As a result of various negotiations between Newport and Levee Board concerning additional property needed for continuation of the flood control projects, the Levee Board sent a letter to Newport on December 11, 1984 which stated:

"The Levee Board acknowledges that it has been negotiating with Newport toward settlement of all claims between them relating to the effects of the Lake Pontchartrain and Vicinity Hurricane Protection Project, Chalmette Area Plan, upon the Newport Reach. To this end, the Levee Board today is executing a compromise-settlement agreement with Newport disposing of the issue of a levee servitude and temporary construction easement and reserving the unresolved issues concerning the construction and effects of the Bayou Bienvenue Flood Control Structure and Dock Area and Outfall Canal Area portion of the Hurricane Protection Project. *The Levee Board acknowledges that some quantum is due Newport for that construction and effects under prior right-*

of-entry agreements. However, the Levee Board and Newport have been unable to agree as to their respective rights to, in and to ownership and use of, the lands involved.

The Levee Board intends to institute judicial proceedings in a court of competent jurisdiction within one year to resolve all such claims and issues remaining between the parties." (emphasis added)

On the next day, December 12, 1984, Newport and the Levee Board executed a Compromise and Settlement Agreement relative to the acquisition of other levee servitudes and easements. That agreement provided, in part:

"Levee Board Acknowledgement of Compensation and Reservation of Newport's Right to Compensation for Prior Flood Protection Project Work. The Levee Board acknowledges that compensation and/or damages are due to Newport under prior rights-of-entry for the lands involved in or affected by work performed to date by the Levee Board and/or by the Corps in the Flood Control Structure and Dock Area and in the Channel Area designated in Exhibit 'A'."

In accordance with its letter of December 11, 1984, and its acknowledgment that compensation was due Newport for the subject property, the Levee Board instituted these expropriation proceedings pursuant to La. R.S. 38:351.

The above described actions of the Levee Board convince us that any prescriptive plea they had was renounced, at least tacitly, if not expressly. And further, their natural obligation to compensate Newport became a civil obligation by their agreement that compensation and/or

damages were due for prior flood control work. At least part of the cause, or reason for Newport entering the agreement with the Levee Board was its recognition of Newport's right to compensation. The natural obligation is sufficient cause for the agreement. The Levee Board cannot now complain, after filing this expropriation suit, that Newport's rights have prescribed.

NEWPORT AS THE PROPER PARTY

The trial court concluded that the landowner's right to compensation is a personal right, and under *St. Julien* it does not pass with the transfer of land. There must be an express transfer or assignment of that personal right. This is a correct legal conclusion.

Admittedly, the cash sale to Newport on June 17, 1982 did not contain a transfer of those rights. However, Newport offered in evidence an Act of Correction, dated May 15, 1985, that expressly conveyed Seaway's compensation rights to Newport. The trial court held this document to be invalid because the corporation had been dissolved in 1983, and thus the resolution authorizing Mr. Waters, the president, to execute the document, could not authorize action on behalf of a dissolved corporation.

We find no error in this portion of the trial court's ruling. However, the trial court failed to consider Newport's argument that Mr. Waters, as the duly appointed liquidator, was, and is vested with the authority to convey any assets of the dissolved corporation. And further, after the case was submitted, but prior to the trial court's decision, Newport filed in the record, as a proffer, a second act of correction dated November 17, 1986. That document is purportedly executed by Mr. Waters in his capacity as liquidator, rather than as president, and con-

veys Seaway's right to compensation to Newport. Assuming the authenticity of the document, it clearly supports a transfer of the personal right to compensation.

Although the trial court allowed the additional evidence as a proffer and did not consider same, we believe judicial economy, and the unusual circumstances of this case require a remand to determine if Newport is the legal owner of Seaway's right to compensation. Because we hold that prescription does not bar the claim for damages, either Seaway or Newport is the owner of that claim. It would serve no useful purpose to dismiss the entire action only to have the same issue litigated again in subsequent expropriation proceedings.

VALUATION

This issue was not heard by the trial court, and thus is presented for the first time on appeal. We decline to address this question until there is a ruling by the trial court.

DECREE

This matter is reversed and remanded to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A-22

APPENDIX B-2

**CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA**

No. 85-21837

Division "J"(S)

**THE BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT**

VERSUS

**NEWPORT LIMITED, A PARTNERSHIP
IN COMMENDAM**

JUDGMENT

This matter came before the Court on the recommendation of the Commissioner and Judge ad Hoc. Opposition, if any, being overruled and considering the law, the evidence and the recommendation of the Commissioner;

IT IS ORDERED, ADJUDGED AND DECREED that the main and incidental demands made in the above styled lawsuit be, and hereby are, dismissed. All parties are to bear their own costs.

JUDGMENT READ, RENDERED AND SIGNED IN NEW ORLEANS, LOUISIANA this 25th day of May, 1990.

George C. Connolly, Jr.
JUDGE

A-23

**CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS**

STATE OF LOUISIANA

No. 85-21837

Division "J"(S)

**THE BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT**

VERSUS

**NEWPORT LIMITED, A PARTNERSHIP
IN COMMENDAM**

STATEMENT OF THE CASE

See original recommendation incorporated herein. Since a remand of this case took place, all stockholders of Seaway Land Company, Inc., a corporation dissolved, were joined as party litigants. Answers and other pleadings were filed by them as below indicated.

FACTS AND OPINION

A brief description of the property involved and its location is necessary to an understanding of the case. The area of Newport's property consisting of 697 acres lies adjacent to Paris Road, which connects Chalmette in St. Bernard Parish with the Michoud area of Orleans Parish, at the high rise bridge which spans the Intercoastal Waterway. The Newport land is located to the east of such bridge and to the south of the waterway. All of the lands are subject to successive tidal overflow by high water caused by storms, hurricanes, and east winds which drive water up the Intercoastal Waterway and the Mississippi River Gulf outlet which Confluences with the waterway along its northmost

boundary. The land is bisected by Bayou Bienvenu, a natural body of water which is also the parish line between St. Bernard and Orleans.

The flood control structure built at the juncture of Bayou Bienvenu and the Intercoastal Waterway is located approximately one and one-half miles from the bridge and is inaccessible by land, except when traversing the spoil bank built up adjacent to the waterway and cutlet when such were dug.

The instant matter, unlike the facts in *Succession of Rovira v. Board of Commissioners*, 418 So. 2d 1382, writ denied 423 So.2d 1147, the "Right of Entry" was specifically granted by the landowner, Seaway Land Company, Inc., to the Levee board for certain designated and described areas and not as in *Rovira*, supra, by another public agency (City of New Orleans) over "City property" without further description, and where title to the property was in a "state of utter confusion".

There is no question that the flood control structure and channel were formed within the described areas of the "Right of Entry" which was accepted by the Levee Board on June 16, 1971. A Board of Directors resolution of Seaway Land Company, Inc. empowered Mr. Arthur C. Waters, its President, to "transfer to the (Levee Board) without consideration" that same identified land in the "Right of Entry" and attachments forming part of it. Consequently the lack of notice of the taking to the numerous heirs as in *Rovira* is clearly not present in the instant situation.

In the instant matter the Court of Appeal "reluctantly" applied the two-year prescriptive period it had previously not reluctantly applied in *Brooks v. N.O.P.S.I.*

370 So.2d 512 (La. 1979), and has effectively held that the Levee Board's right to the possession of the property in question is unassailable, whether it be called, use, usufruct, servitude, etc., and concurrently the landowner's right to compensation and/or damages prescribed "presumably" on September 13, 1976.

The Court of Appeal went on to find that the Levee Board "tacitly, if not expressly" renounced the liberative prescription which it found fully accrued as of September 13, 1976 and that a "new obligation" was created. The court of Appeal held that a letter, dated December 11, 1984, by the then President of the Levee Board which stated in part

"The Levee Board acknowledges that it has been negotiating with Newport toward settlement of all claims between them relating to the effects of the Lake Pontchartrain and Vicinity Hurricane Protection Project, Chalmette Area Plan, upon the Newport Reach. To this end, the Levee Board today is executing a compromise - settlement agreement with Newport disposing of the issue of a levee servitude and temporary construction easement and reserving the unresolved issues concerning the construction and effects of the Bayou Bienvenue Flood Control Structure and Dock Area and Outfall Canal Area portion of the Hurricane protection Project. The Levee Board acknowledges that some quantum is due Newport for that construction and effects under prior right-of-entry agreement. However, the Levee Board and Newport have been unable to agree as to their respective rights to, in and to ownership and use of, the lands involved.

The Levee Board intends to institute judicial pro-

ceedings in a court of competent jurisdiction within one year to resolve all such claims and issues remaining between the parties."

together with the institution of this lawsuit, constituted a renunciation of the fully accrued prescription in favor of the Levee Board. In so finding it seems to infer that the transfer for \$2,247,826.40 to Newport for "serverance damage" to remaining land, after a "donation" of levee servitude not involved, also was "caused" by the Levee Board's acknowledgement of its "natural obligation" to pay for the flood control it fully acquired in 1976.

The Levee Board again asserted the prescription defense.

In its decision on remand, the Court of Appeal remanded "to determine if Newport is the legal owner of Seaway's right to compensation" and, if so, to determine the valuation.

In furtherance of this, all of the stockholders of Seaway were joined to determine the issue of the right of Harcourt Waters, the Liquidator of Seaway to enter the post facto corrections, etc. to include a transfer of its personal rights, if any, against the Levee Board to Hewport, which took place subsequent to the final dissolution of Seaway. The stockholders were joined and made no assertion with respect to such actions by the liquidator and would presumably be estopped from asserting any claims in the future against the parties in this matter as a result of their disavowal of interest filed herein.

In the absence of the stockholder participation, the issue of whether Newport is the legal owner of Seaway's right to compensation (assuming such right exists), re-

mains unanswered. However, the stockholders inaction compels the conclusion that H. Harcourt Waters, ex-president and liquidator of Seaway, did, for no consideration, transfer whatever latent, inchoate rights Seaway may have had to Newport.

In its reassertion of the prescription defense held to be "renounced" by the actions of the Levee Board, the Levee Board points to Article 14(A) of the 1974 Constitution which states:

"14. Donation, Loan, or Pledge or Public Credit

Section 14. (A) Prohibited Uses. Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private."

The attention of the Court of Appeal was not directed to this and such was not considered by it in its previous ruling.

The "natural obligation" asserted by the Court of Appeal is simply non-existent, since the land itself was initially granted to Newport's predecessor by the sovereign, and its recapture by the sovereign would create no "natural obligation". It would create a constitutional obligation under Article 2, and Article 4 (note difference in appropriation and expropriation, and which grants to authorities the right to acquire by prescription, as in the instant case.)

In 1983 Art. 7, 14(B) of the Constitution of 1974 was amended by adding (4) by the people of Louisiana to allow the legislature to return "property", including "mineral

rights" to former owners divested of title by expropriation or threat thereof when the "public and necessary" purpose hasw ceased to exist. Lands in Caernarvon in Plaquemines Parish are subject to the amendment. The preceding subsections numbered (1) through (3) refer to funds, pensions and bonds issued for payment of "public obligations as provided by law...."

The definition of a "natural obligation" is found in Article 1760 C.C. and in Article 1762 a prescribed "civil obligation" is given as an example. If renunciation can be legally and effectively done by either the state or a political subdivision and/or its President by finding that a "natural obligation" gave rise to a yet new obligation, then the funds and property of the state and its political subdivisions would be subjected to the abuses inherent in our system by each succeeding administration which could each decide to undermine transactions settled conventionally or by law by finding natural obligations which create "new obligations" then enforceable. Article 1761 clearly does not envision the judicial enforcement of natural obligations. Neither does Article 2303 which prohibits recovery of amounts paid onn a natural obligation. The vagaries of natural obligations were added to the Civil Code in 1984.

Renunciation was not discussed in the Constitutional Convention of 1973 according to the indices of the Verbatim Transcripts, XXXIII pages 67-84, 104-107, XXXVIII pages 102, 103, and XXXIX pages 187, 188-189 and 198 in relation to Article 7, Section 14.

In enacting the sentence numbered four (4) to Article 7 of 14(B) of the 1974 constitution, the intent was to preserve the assets of the state and its subdivisions which have a public purpose in accordance with subsection A of

Article 4, supra. To suggest that upon renunciation a new obligation is created does violence to the intent to protect the assets (money and property) of the state from recognitions by constitutionally unauthorized functionaries finding natural obligations as defined by such functionaries.

There is no question that Seaway, when it granted its "right of entry" would receive seampland acreage which lie outside of already existing levees. The Board of Directors of Seaway in its authorization to Arthur C. Waters, its President, clearly recognized this when it authorized a "transfer....without consideration."

Indeed, the subsequent donation of levee right of way by Newport to the Levee Board will, perhaps in the distant future, avail future generations with the utility of these lands.

It is therefore recommended that the main and incidental demands be dismissed.

In order to prevent further unnecessary remands, if, as is not recommended, a value of the lands is required that value should be the per-square-foot value of the ground purchased by Newport in 1984. This valuation would be extremely generous considering that the valuation should be made as of September 13, 1976 when the claim of Seaport, if any, prescribed.

A suggested form of Judgment is annexed.

March 15th , 1990

/s/ John M. Holahan

JOHN M. HOLAHAN
COMMISSIONER AND JUDGE
AD HOC

A-30

APPENDIX B-3

**CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA**

No. 85-21837

Division " "

DOCKET

**THE BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT**

VERSUS

**NEWPORT LIMITED, A PARTNERSHIP
IN COMMENDAM**

FILED: _____
DEPUTY CLERK

JUDGMENT

Trial on the Motion to Dismiss was heard on
November 10, 1986.

PRESENT: Richard J. McGinity,
Attorney for the Orleans Levee
Board

John M. Wilson
Julie E. Schwartz,
Attorneys for Newport Limited
and Newport Enterprises

When, after hearing the testimony of the witnesses,
the evidence and the arguments of counsel, the Court con-
sidering the law and the evidence to be in favor of the plain-

tiff as per the reason of the Commissioner-Judge ad Hoc adopted hereby The Board of Levee Commissioners of the Orleans Levee District, for the reasons contained in the written opinion of this Court:

IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss be and the same is hereby granted, dismissing the main action and all incidental actions, each party to bear its own costs.

Judgment read, rendered and signed in open court this 20th day of November, 1986, at New Orleans, Louisiana.

/s/ George C. Connolly, Jr.

J U D G E

APPROVED AND SUBMITTED:

/s/ John M. Holahan

JOHN M. HOLAHAN
COMMISSIONER

**CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA**

No. 85-21837

Division " "

DOCKET

**THE BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT**

VERSUS

**NEWPORT LIMITED, A PARTNERSHIP
IN COMMENDAM**

FILED: _____
DEPUTY CLERK

REASONS FOR JUDGMENT

The Orleans Levee Board filed a Motion to Dismiss its own action as well as the incidental actions of Newport Limited and Newport Enterprises, who reconvened against the Levee Board seeking additional compensation.

Although styled a motion to dismiss, plaintiff's motion as to defendant's incidental demands is in effect an exception of no right of action and an exception of prescription. The Court sustains both exceptions.

THE FACTS

On May 21, 1971, the prior landowner, Seaway Land Co., Inc. gave the Levee Board written authority to enter upon its property for the purpose of constructing a closure dam and flood gates on marsh lands in the area of Bayou

Bienvenue and the Mississippi River Gulf Outlet in eastern New Orleans.

Acting under the above authority, the Levee Board and the U.S. Corps of Engineers constructed the Bayou Bienvenu Control Structure which was completed in 1974.

According to the testimony of Mr. Harcourt Waters, former President of Seaway Land Co., Inc., Seaway did not at any time seek compensation for the land taken to build the structure between May 21, 1971 until it sold the property to defendants on June 17, 1982, a period of eleven years. Defendants admit they purchased the property from Seaway with full knowledge of both the existence of the structure and that it was constructed with the consent of Seaway, their ancestor in title.

NO RIGHT OF ACTION

Under the facts of this case, the court concludes that the *St. Julien* doctrine is applicable. *St. Julien v. Morgan, Louisiana and Texas Railroad Co.*, 35 La. Ann. 924 (1883). Under *St. Julien*, the landowner is limited to an action for compensation for the value of the property taken.

This right to compensation is personal to the owner of the land at the time the property right does not pass with a transfer of the land and can be conveyed only by express transfer, assignment or subrogation. *Gumble v. New Orleans Terminal Co.*, 197 La. 439, 1 So.2d 686 (1941); *Brooks v. NOPSI*, (4th Cir. 1979), 370 So.2d 686.

It is plaintiff's contention that there was no valid express transfer of this personal right from Seaway to defendants and, therefore, defendants have no right of action to claim compensation. The court agrees.

In defense of plaintiff's contention, defendants produced a document dated May 15, 1985, that purported to expressly convey Seaway's right for compensation to defendants. Said document was executed by H. Harcourt Waters as President of Seaway, under authority of an alleged resolution passed at a regular meeting of the Board of Directors of Seaway, and certified as true and correct by the same Mr. Waters as Secretary of the corporation.

However, Mr. Waters testified that the corporation was dissolved in 1983, almost two years before the purported transfer to defendants, and the evidence supports this fact. (See Levee Board Exhibits Nos. 28 and 29). Mr. Waters also testified that he was never Secretary of the corporation. For these reasons, the court finds that the Act of CORrection dated May 15, 1985, purportedly transferring the corporation's personal right to compensation to defendants is invalid.

Therefore, without an express transfer of Seaway's personal right of compensation to defendants, the court holds that the defendants have no right of action to seek compensation for the property taken by the Levee Board in 1971.

PREScription

Although the court's finding that the defendants have no right to seek sompensation eliminates the necessity to rule on plaintiff's exception of prescription, it finds it expedient to do so at this time.

In 1976, the Supreme Court partially overruled the *St. Julien* doctrine in *Lake, Inc. v. L.P. & L. Co.* (La. 1976)

330 So.2d 914.¹ As pointed out in *Brooks v NOPSI*, *supra*, the state legislature reacted promptly to the *Lake* decision by enacting L.R.S. 19:14 (Act 504 of 1976). In essence, this statute reinstated the *St. Julien* doctrine and added to it a prescriptive period of two years within the property owner must make his claim for compensation, commencing on the date on which the property was actually occupied and used. L.R.S. 19:2.1B.

Since prescriptive statutes are remedial, they apply to all actions instituted after they became affective, even though the cause of action arose prior to the statute's enactment. *Lott v. Haley* (4th Cir. 1978) 363 So.2d 1270; *Brooks v. NOPSI*, *supra*. Accordingly, the two year prescriptive period applies in this case.

The undisputed evidence in the record shows that work actually commenced on February 10, 1972 when bulldozers entered upon the property and began construction. (Levee Board Exhibit No. 30).

In view of the fact that no action was taken by the landowner to assert its claim for compensation, the Court finds that the claim for compensation clearly prescribed on February 10, 1974, being two years after the date the land was actually occupied and used by the Levee Board. L.R.S. 19-2.1B.

¹ The decision is applied only prospectively and therefore has no effect on this court's ruling as to no right of action.

A-36

For the reasons aforesaid, the Motion to Dismiss is granted.

New Orleans, Louisiana this 20th day of November, 1986.

/s/ George C. Connolly, Jr.

J U D G E

APPROVED AND SUBMITTED:

/s/ John M. Holahan

JOHN M. HOLAHAN
COMMISSIONER

A-37

APPENDIX C

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, *May 9, 1991*

DEAR SIR:

REHEARING WAS THIS DAY REFUSED
IN THE CASE ENTITLED

THE BOARD OF LEVEE
COMMISSIONERS FOR
THE PORT OF NEW
ORLEANS

NEWPORT LIMITED,
A PARTNERSHIP
IN COMMENDAM

v.

No. 90-CA-1490

Very truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

APPENDIX D

THE SUPREME COURT OF THE
STATE OF LOUISIANA

THE BOARD OF LEVEE COMMISSIONERS OF THE
ORLEANS LEVEE DISTRICT

VS.

NO. 91-C - 1318

NEWPORT LIMITED, A PARTNERSHIP
IN COMMENDAM

IN RE: Newport Limited; Newport Enterprises; - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number 90CA-1490; Parish of Orleans Civil District Court Div. "J" Number 85-21837

September 6, 1991

Denied.

JCW
PFC
WFM
JLD
HTL
LFC
PH

Supreme Court of Louisiana
September 6, 1991

/s/ Illegible

Clerk of Court
For the Court

APPENDIX E-1

TO: *BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT*

The undersigned hereby grant to the board of Levee Commissioners of the Orleans Levee District, and/or its assigns, the right to immediately enter upon the hereinafter described property for the purpose of constructing the Bayou Bienvenue Control Structure, a feature of the Lake Pontchartrain and Vicinity, Louisiana Project.

The lands in, on and to which this right of entry applies are described as follows:

Being all of those areas in Township 12 South, Range 13 East, in Orleans Parish, Louisiana, shown on U. S. Army Engineer District, New Orleans, Corps of Engineers, Map File No. H-4-25131, Drawings 1 through 4, entitled "Bayou Bienvenue Control Structure," colored red for fee simple, green for perpetual channel, and blue for temporary spoil areas, as a means of easy identification, attached hereto and made a part hereof.

The right of entry herein granted is transferable to the United States of America for the purpose of construction of the aforesaid Bayou Bienvenue Control Structure.

It is agreed that negotiations will be entered into promptly for the acquisition by the Board of Levee Commissioners of the Orleans Levee District of fee simple for the control structure site, permanent easements for the channel and a temporary area for placement of spoils, in the lands upon which this right of entry is granted under

mutually satisfactory terms, or, if mutually satisfactory terms cannot be agreed upon, that the Board of Levee Commissioners of the Orleans Levee District will take steps to acquire the interest by condemnation procedure.

It is further agreed that the value of the lands to be acquired by the Board of Levee Commissioners of the Orleans Levee District shall not be considered either depreciated or enhanced by any construction, dredging or deposit of spoils performed by the United States of America, or its assigns, or by related Work by the Board of Levee Commissioners of the Orleans Levee District, the value of such lands to be considered as remaining as it is at present and to be arrived at as though no construction, dredging or deposit of spoils or other related works had taken place.

This right of entry shall remain in full force and effect during the construction of the Bayou Bienvenue Control Structure, but shall not exceed a period of three (3) years from the date construction begins or the lands herein described have been acquired by the Board of Levee Commissioners of the Orleans Levee District.

Date of instrument: May 21, 1971 .

Seaway Land Company, Inc.

By /s/ Arthur C. Waters
Pres-

A-41

APPENDIX E-2
ORDERS TO PAY OR DEPOSIT
CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

No. 85-21837

Division " "

Docket

THE BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT

VS

NEWPORT LIMITED, A PARTNERSHIP
IN COMMENDAM

FILED: _____
DEPUTY CLERK

PETITION FOR EXPROPRIATION
PURSUANT TO LSA R.S. 38:301

The petition of The Board of Levee Commissioners of the Orleans Levee District, a subdivision of the State of Louisiana, with its main office located at New Orleans, Louisiana, respectfully represents:

I.

The property to be expropriated is situated entirely in the Parish of Orleans and therefore is within the jurisdiction and venue of this Court.

II.

The defendants, Newport Limited, a partnership in commendam, whose sole general partner is Newport Enter-

prises, a partnership is commendam, whose sole general partners are C. Bronson Doyle and Donald W. Doyle, Jr., domiciled in this Parish and State, are the owners of the property to be expropriated herein.

III.

The property to be expropriated is situated on the south side of the Mississippi River Gulf Outlet (MRGO) from the Inner Harbor Navigation Canal to Bayou Bienvenue and from the MRGO to the Orleans Parish line. Said property is to be used for flood structures, channels and levee rights of way and constitutes 25.77 acres, all as more fully described on Exhibit "A" annexed hereto and made a part hereof.

VERIFIED

IV.

The reason and purpose for which the property is to be expropriated is that in order to insure adequate flood protection for that part of the Parish of Orleans known as the Lower Ninth Ward, it is necessary to provide rights of way for the construction of floodwalls, levees, navigation and floodgate structures and channels in and upon the above described area.

V.

The construction of said levee will be greatly conducive to the public interest and safety and is an important part of the overall flood and hurricane protection plan for New Orleans East and particularly for that area on the South side of the Mississippi River Gulf Outlet from the Inner Harbor Navigation Canal to Bayou Bienvenue and from the Mississippi River Gulf Outlet to the Orleans Parish boundary Line.

VI.

Of the total 25.77 acres expropriated, 1.74 acres is required for flood structures, 0.11 acres for dock structures, 19.09 acres for channels and 4.83 acres for levee rights of way, all having a total value of \$113,388.00. In addition thereto, defendant's property consisting of a 15.08 acre tract more fully described in Exhibit "B" annexed hereto, sustained severance damages in the amount of \$133,176.00. Therefore, the total amount due defendant is \$146,564.00, which amount is deposited herewith.

VII.

There are no buildings or improvements situated wholly or partially on the property to be expropriated and therefore petitioner desires and is entitled to enter upon and take possession of said property as described in Exhibit "A" upon the deposit of the estimated compensation with the registry of the Court.

VIII.

Plaintiff annexes hereto the following documents:

1. Certified copy of the Resolution of Expropriation marked Orleans Levee Board Exhibit "C".
2. A plan and survey of the property to be expropriated and the work to be performed thereon marked Orleans Levee Board Exhibit "D".
3. An itemized statement of the amount of money estimated to be the full extent of the owner's loss, duly executed as required by law, marked Orleans Levee Board Exhibit "E".

WHEREFORE, the petitioner prays that an order issue herein directing petitioner to deposit the sum of \$146,564.00 in the registry of this Court and declaring that the property described in Exhibit "A" annexed to this petition has been expropriated for flood structures, channels and levee rights of way, and authorizing petitioner to enter upon and take possession of said property immediately upon said deposit being made.

Petitioner further prays that the defendant named herein be served with a copy of the petition and order and the clerk's receipt for said deposit as well as a notice to said petition has been expropriated according to law.

Petitioner further prays that, upon a final hearing herein, there be judgment in favor of your petitioner fixing a just amount of compensation to be paid to the person or persons entitled thereto a sum not to exceed \$146,564.00, including severance damages of \$33,176.00.

Petitioner further prays for all costs of these proceedings.

Respectfully submitted:

RICHARD J. McGINTY

/s/ Illegible

GENERAL COUNSEL
THE BOARD OF LEVEE
COMMISSIONERS OF THE
ORLEANS LEVEE DISTRICT
24th Floor
225 Baronne Street
New Orleans, LA 70112

A-45

ORDER

Let the amount of the above estimate, to-wit, the sum of \$146,564.00, be deposited in the registry of this Court' it is hereby ordered that as of the time this deposit has been made, the above described property as more fully described in Exhibit "A", has been expropriated for levee purposes as set out hereinabove.

New Orleans, Louisiana, this 23rd day of December, 1985.

/s/ Illegible

J U D G E

PLEASE SERVE:

Newport Limited, through
Newport Enterprises, through
C. Bronson Doyle
and
Donald W. Doyle, Jr.
Suite 1980 Pan American Life Building
601 Poydras Street
New Orleans, LA 70130

12/23 1985

Received 146,564.00

7276

A Guillary

Clerk

MOTION #10-112084

RESOLUTION: #11-112084

BY: President Schneider
By Request
President Pro Tem Ross

November 20, 1984

R E S O L U T I O N

WHEREAS, in order to insure adequate flood protection for the lower Ninth Ward and to comply with the Board's assurances of the Lake Pontchartrain Louisiana and Vicinity Hurricane Protection Project, Chalmette Area Plan, it is necessary to provide rights of way for the construction of floodwalls, levees, navigation structure, floodgate structure and associated channels on the south side of the Mississippi River Gulf Outlet from the Inner Harbor Navigation Canal to Bayou Bienvenue and from the Mississippi River Gulf Outlet to the parish line as may be required, and

WHEREAS, this section of levee not only protects citizens of Orleans Parish but those of St. Bernard Parish as well and

WHEREAS, for the past several years the Board has attempted to negotiate amicably the acquisition of the property required which efforts have been successful except in the area east of Paris Road, and

CASE NO. _____
ORLEANS LEVEE BOARD
EXHIBIT NO. C

WHEREAS, further delay will seriously hamper and delay the over-all project and will expose the entire area to prolonged and unnecessary risk of flooding, and

WHEREAS, it is therefore necessary to obtain possession at the earliest possible time and this requires that the needed property be expropriated in accordance with LRS 38:301 et. seq., and other laws as may be applicable in the premises.

BE IT HEREBY RESOLVED, That the Board of Levee Commissioners of the Orleans Levee District, for the purposes herein stated and in exercise of its duties and by virtue of the powers vested in it by Louisiana Constitution of 1974, Article 6, Sections 41 and 42, the Louisiana Revised Statutes and particularly LRS 38:301 et.seq., does hereby expropriate all rights, title and servitudes as required in the premises of all properties not amicably acquired prior to the filing of a Petition and Order of expropriation and which properties are situated within the area as set out on Orleans Levee Board Drawing No. 61 C 14 latest revision November, 1984, and described as follows:

Commencing at the intersection of Bayou Bienvenue and the Inner Harbor Navigation Canal thence in a northerly direction to the beginning of the Mississippi River Gulf Outlet thence along the Mississippi River Gulf Outlet in an easterly direction to Bayou Bienvenue thence in a westerly direction along the north bank of Bayou Bienvenue to the point of beginning.

BE IT FURTHER RESOLVED, That the President, President Pro Tem or Managing Director, are hereby authorized and directed to proceed with said expropriation

and to deposit with the registry of the proper court, that amount of money as may be determined to be the fair value of said property, all in accordance with the law.

AYES: Commissioners Ross,
Barthelemy, Ducote,
hammond, Talbot, Uddo

NAYS none

ABSENT: none

RESOLUTION ADOPTED: yes

THE FOREGOING IS CERTIFIED TO
BE A TRUE AND CORRECT COPY.

/s/ H. B. Lansden

H. B. LANSDEN, SECRETARY
THE BOARD OF LEVEE COMMIS-
SIONERS OF THE ORLEANS
LEVEE DISTRICT

CASE NO. _____

ORLEANS LEVEE BOARD

EXHIBIT NO. C

November 20, 1985

The Board of Levee Commissioners
Orleans Levee District
Lakefront Airport
New Orleans, LA 70126

Re: Chalmette Loop Levee
South Side MRGO also
Bayou Bienvenue Control Structure,
Newport Enterprises Property
Appraisals

Gentlemen:

Pursuant to your request dated November 7, 1985 for valuations of "Perpetual Easements for Bayou Bienvenue Control Structure" based on revised figures recently given to us, we hereby submit our "Certification of Fair Market Value."

The date of valuation pertaining to "Levee Right of Way and Bayou Bienvenue Control Structure" is as of October 13, 1971.

The undersigned appraisers have made a personal and careful inspection of the property identified above, and have thoroughly investigated and analyzed matters to the estimation of value of same. The purpose of this appraisal is to estimate the total value which includes the Fair Market Value of the subject properties, and the "just compensation" due the property owners.

The term "Market Value" as used herein is defined as the highest price, estimated in terms of money, which the subject property will bring if exposed for sale with a

reasonable time allowed for finding a purchaser buying with a knowledge of all the uses to which it is best adapted, and for which it is capable of being used. The term "just compensation" as used herein is defined as the highest price estimated in terms of money, to which the owner is entitled to, for the taking, including severance and consequential damages, where applicable.

By reason of our investigation, we are of the opinion that the value of the following tracks are as follows:

CASE NO _____

ORLEANS LEVEE BOARD

EXHIBIT NO. E

1222 Broadway • New Orleans, Louisiana 70118 • (504) 861-8034

A-51

The Board of Levee Commissioners
Re: Chalmette Loop Levee
November 20, 1985
Page 2

BAYOU BIENVENUE
CONTROL STRUCTURE
Date of Valuation, October 13, 1971

PERPETUAL EASEMENT

AD LEVEE R/W	\$113,388.00
(25.77 acres)	

SEVERANCE DAMAGE	33,176.00
(Island Area 15.08 acres)	

"Just Compensation"	\$146,564.00
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TOTAL VALUE	\$146,564.00
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We hereby certify that we have no monetary interest, present or contemplated, in the property and that neither the employment to make the appraisal, nor the compensation, is contingent on the value of the herein appraised property.

We further certify that we have personally inspected the property and according to our knowledge and belief, all statements and information in this report are true and correct.

A-52

Respectfully submitted,

/s/ W. John Tessier

W. John Tessier,
I.F.A.S. APPRAISER

/s/ C. J. Tessier, Jr.

C. J. Tessier, Jr.,
CO-APPRAISER

/s/ Bert M. Cass, Sr.,

Bert M. Cass, Sr.,
M.S.A. APPRAISER

CASE NO. _____

ORLEANS LEVEE BOARD

EXHIBIT NO. E

BERT M. CASS, SR. • REAL ESTATE BROKER-APPRAISER

